136-380

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 316.

J. H. ALLEN, THOMAS H. WEST AND JOHN C. BUSH, CO-PARTNERS AS ALLEN, WEST AND BUSH, AND THOMAS FLETCHER, AS U. S. MARSHAL, APPELLANTS,

vs.

HELENA HANKS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED APRIL 6, 1887.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, DECEMBER 6, 1889.

1 UNITED STATES OF AMERICA,
Eastern Division, Eastern District of Arkansas:

Be it remembered that at a regular term of the district court of the United States for the eastern division of the eastern district of Arkansas, begun and holden at the Federal court-room, in the city of Helena, on the second Monday in March, A. D. 1887, the same being the 14th day of said month, there was present and presiding Hon. Henry C. Caldwell, judge of said court; Thomas Fletcher, marshal of said district, and Samuel I. Clark, clerk of said court, when among other proceedings had were the following, viz:

In the District Court of the United States for the Eastern District of Arkansas, at Helena.

Bill of Complaint.

HELENA HANKS, Complainant,
against
2 J. H. ALLEN, THOMAS H. WEST, and JOHN C. BUSH, Co-partners under the Firm Name & Style of Allen, West & Bush, Defendants. } 104.

The complainant, Helena Hanks, states that she is a citizen of the State of Arkansas, and that the defendant, J. H. Allen, is a citizen of the State of Louisiana; the defendant, Thomas H. West, is a citizen of the State of Missouri, and the defendant, John C. Bush, is a citizen of the State of Alabama; that the firm of Allen, West & Bush are cotton factors and commission merchants, doing business in the city of New Orleans, in the State of Louisiana. Complainant states that William Porter and Ann Amelia Porter, his wife, being the owners in fee simple of the following lands, situate, lying, and being in the county of Phillips, and State of Arkansas, to wit:

Part of Spanish confirmation 2364, originally patented to Moses Barnett, containing 314.27 acres; the northwest fractional quarter
3 of section 24, containing 28.16 acres; the northeast quarter of section 23, 160 acres; the east half of the northwest quarter of section 23, containing 80 acres; the north half of the southeast quarter of section 23, containing 80 acres; the northeast quarter of the southwest quarter of section 23 and the northwest fractional quarter of the northwest fractional quarter of section 24, 43.85 acres, all in township 2 south and in range 4 east, and containing in the aggregate 746.28 acres, on the 2nd day of January, 1871, by their deed of that date, duly executed and acknowledged, for a valuable consideration, sold and conveyed said lands, together with other property, to this complainant; that afterwards, to wit, on the 24th day of May, 1875, she caused said deed to be duly filed for record in the office of the circuit clerk and *ex officio* recorder of the county of Phillips and State of Arkansas, and that said deed was by him duly recorded in Book A[9], pages 393 & 394; all of which will

more fully appear by reference to a duly certified transcript
4 of said deed from the records of said county, which is herewith filed, marked Exhibit "A," and made a part of this bill as if herein copied.

Complainant further charges that said lands constituted a plantation commonly known as the Cunningham place, and that from the time she acquired said property as aforesaid up to the present time said plantation has been held by her as her sole and separate property, and the same has been cultivated and operated by her in her individual name and for her benefit.

Complainant further states that at the time she acquired said property up to and until the present time she was and has been and still is the wife of James M. Hanks, but that the only control which her said husband has ever exercised over said property since she acquired title thereto has been as her agent and for her, the contracts thereon being made in her name and the business being for her benefit and her business, as has been apparent to all the world.

5 Complainant further states that heretofore, to wit, on the 14th day of October, 1884, the said defendant recovered on the law side of this hon. court a judgement against W. L. Nelson and the said James M. Hanks, lately copartners under the firm name and style of Nelson & Hanks, for the sum of $14,645.20; that said judgement was founded upon a verified account, the debt having been created on or about the — day of ——, 1881.

Complainant further charges that said defendants have caused an execution to be issued out of this hon. court, directed to the marshal and to be placed in his hands, and have caused the said marshal to levy upon the following lands as the property of the said James M. Hanks, to wit: The northeast quarter, the east half of the northwest quarter, the northeast quarter of the southwest quarter, the north half of the southeast quarter of section 23; the west half of the southwest frac. quarter, 40.47 acres; the northwest frac.
6 quarter, 28.16 acres, of sec. 24; the southwest frac. quarter, 4.70 acres, of section 13, in township 2 south and in range 4 east; also that part of Spanish grant No. 2364 embraced in and numbered 12, 13, 14, & 15 in the partition made among the heirs of William H. Bailey as the same are designated and described in the partition deed and survey and plat thereof, of record in Book D and pages 543 to 547, being a part of the land embraced in said Cunningham place and sold and held by this complainant as aforesaid, and that said property is advertised to be sold on January 27th, 1887.

Complainant charges that the said James M. Hanks, although her husband, has, under the constitution and laws of the State of Arkansas, no right or title to said property or the rents, issues, or profits therefrom, she holding the same by grant and operating the same as her own property and in her own name, her said husband exercising no control over said property except as her agent
7 for her and in her name.

Complainant further charges that if said sale under said execution is permitted to be made a cloud will be cast upon her

said property, which it is inequitable and unjust to her to permit.

Wherefore complainant prays that said Allen, West & Bush and said Thomas Fletcher, as marshal of the eastern district of Arkansas, may be made parties defendant hereto, and may be required severally to make answers to the allegations in this bill contained, but answers under oath are not repuired; that an injunction may issue restraining and inhibiting said defendants or either of them from selling or offering to sell any of said property under said levy and advertisement; that said property may by decree of this hon. court be declared to be, under the constitution and laws of the State of Arkansas, her sole and separate property, and so long as she may
choose be exempt from the contracts, debts, or liabilities of
8 her said husband and not subject to levy or sale upon executions issued or judgments rendered against him, and that she may have all other and proper relief in the premises.

And she will ever pray, &c.

TAPPAN & HORNOR,
Attorneys for Complainant.

STATE OF ARKANSAS, *County of Phillips:*

Helena Hanks, complainant in this suit, states on oath that she believes the facts stated in the foregoing complaint to be true.

HELENA HANKS.

Sworn to and subscribed before me this 22d day of January, 1887.

[SEAL.] JNO. J. PORTER, *N. P.*

We acknowledge service of above bill and authorize the application for injunction to be made to Hon. H. C. Caldwell on Monday, the 24th inst., at chambers, in Little Rock.

Helena, January 22, 1887.

STEPHENSON & TRIEBER,
Sol's for Def'ts, Allen, West & Bush.

9 Endorsed: The clerk will issue an injunction as prayed for in the bill. January 24, 1887. Henry C. Caldwell, judge. We accept notice of the above injunction and waive the issuance of the notice. January 26, 1887. Stephenson & Trieber, sol's for Allen, West, & Bush & for the marshal. Filed January 25th, 1887. Samuel I. Clark, clerk.

Answer.

In the U. S. District Court for the East. District of Arkansas, at Helena.

HELENA HANKS, Pl'ff, }
vs. } Answer of Def'ts.
ALLEN, WEST & BUSH, Def'ts, }

The joint and several answers of the defendants herein to
10 the bill of complaint of Helena Hanks, complainant.

These defendants, now and at all times hereafter, saving to themselves all manner of benefit or advantage of exception or otherwise

that can or may be had or taken to the many errors, uncertainties, or imperfections in the said bill contained, for answer thereto or to so much thereof as they are advised it is material or necessary for them to answer, answering, say:

They admit the citizenship of the parties as alleged in the bill, and that on the 2nd day of January, 1871, by their deed, Wm. Porter and Ann Amelia Porter conveyed to complainant the realty in said bill described and as is more fully shown by reference to the copy filed with said bill and marked Exhibit A, and that said deed was filed for record in the office of the circuit clerk & *ex officio* recorder of Phillips county, Arkansas, on the 24th day of May, 1875, and duly recorded by him; but they deny that the said realty
11 was owned then in fee simple by said William Porter & Ann Amelia Porter, and they also deny from the time of the execution of said deed complainant has held the same as her sole and separate property & had it cultivated for her benefit, and they also deny that the only control which her husband, James M. Hanks, had was as her agent, but they allege the truth to be—

That all of the property in said before-mentioned deed described, and also considerable other property which was of about the same value, had been the property of one John F. Hanks, who departed this life intestate on the — day of ——, 1864, seized thereof.

That he left him surviving as his sole heirs-at-law Fleetwood Hanks, his father, who, under the laws of the State of Arkansas, inherited said realty for life, and the remainder to the other heirs, viz., James M. Hanks, his only brother, and Ann Amelia Porter, his only sister.

12 That on the — day of ——, 1870, the said Fleetwood Hanks died, whereby his interest in said realty ceased, and by the laws of descent of the State of Arkansas the same became the absolute property in fee simple of the said James M. Hanks & Ann Amelia Porter, share and share alike, the said James M. Hanks taking possession of the property now levied on and retaining it ever since, although undivided as to the title until January 2nd, 1871.

That on the 2nd day of January, 1871, the said James M. Hanks & Ann Amelia Porter concluded to partition said realty, which up to that time they had owned undivided as tenants in common, and the said Hanks also desiring to have his half conveyed to his wife, who is the complainant in this action, it was agreed between him and his sister that he should convey to her all his right, title, & interest in & to all of said realty, and that she should reconvey certain parts of it, which had been agreed upon as being one-half in value of the entire estate inherited by them as aforesaid,
13 to the complainant, Helena Hanks, wife of said James M. Hanks.

That in pursuance of said agreement the said James M. Hanks, for the alleged consideration of five dollars, on the 2nd day of January, A. D. 1871, executed his deed, whereby he conveyed all his right, title, & interest in & to the entire estate inherited by him & his said sister from the estate of said Jno. F. Hanks, as well as

from the estate of their father, Fleetwood Hanks, to his sister, the said Ann Amelia Porter, his wife, Helena Hanks, joining him in said deed for the purpose of relinquishing her dower interest, in conformity with the laws of the State of Arkansas, and for no other purpose; all of which does more fully appear by reference to a certified copy of said deed, herewith filed, marked Exhibit No. 1.

That on the same day & at the same time the said Ann A. Porter executed & delivered her deed to the complainant, Helena Hanks, as is shown by the deed filed with complainant's bill as Ex-
14 hibit A; that her husband, William Porter, joined her in said deed, because under the laws of this State in force at that time a married woman could only convey real estate by joining her husband, and also for the purpose of conveying his marital rights to which he was entitled in the land of his wife.

Defendants, further answering, say it is true that they recovered the judgment as set out in the bill of complaint, and have caused an execution to be issued directed to the marshal, and have caused him to levy on the lands described in the bill of complaint, and that the same was advertised by said marshal to be sold, as alleged by complainants, but they deny that the same was levied on or advertised to be sold as being the property in fee of said James M. Hanks; but, on the contrary, they allege that all they caused the marshal to levy on & advertise for sale, & all the said marshal did levy on & advertise for sale, under said execution was
15 the interest of said James M. Hanks, one of the defendants in said execution, in and to said lands and none other.

And defendants deny that said James M. Hanks, although the husband of complainant, has, under the constitution & laws of the State of Arkansas, no right or title to said property or the rents, issues, or profits therefrom; but, on the contrary, they charge and allege that under the constitution & laws of said State of Arkansas the said James M. Hanks, by reason of his intermarriage with complainant & the other reasons hereinafter more fully set forth, has a life interest in and to said realty, and is entitled to the possession thereof for his life, and also the rents and profits therefrom, and which said estate is subject to levy and sale under execution.

Defendants allege and charge that the said James M. Hanks and the complainant, Helena Hanks, intermarried in the State of
16 Arkansas in the year 1859; that on the — day of ——, 1859, there was born to them a son, who lived for a number of years, and who, had he survived his parents, could have inherited the property herein involved.

That by reason of said marriage between the said James M. Hanks and the complainant, Helena Hanks, the said James M. became entitled, under the laws of the State then in force, to a freehold estate in and to all the lands then owned or thereafter acquired by complainant and the rents and profits arising therefrom, to continue during coverture, and that by reason of the birth of their son as aforesaid he became entitled to an estate *of* curtesy initiate, under the laws of the State of Arkansas then in force, to all the lands then

owned or thereafter acquired by his wife during coverture, and such estate to continue for his life.

That said estate by courtesy thus acquired by said James
17 M. Hanks as aforesaid became after the birth of said child a vested right, which the constitution adopted by the people of the State of Arkansas on Oct. 30th, 1874, neither intended nor lawfully could divest him of.

That said estate having become vested in said Hanks on the said 2d day of January, 1871, by the execution and delivery of the deed of conveyance from Ann Amelia Porter to his wife, Helena Hanks, the same was thereafter and as long as it continued to be the property of said Helena & James M. Hanks subject to execution under a judgment against the said James M., so far as his interest went, viz., his life estate, the deed to said Helena Hanks not excluding the marital rights or right of courtesy of her husband, nor she having had any record of her intention to hold the same to her sole and separate use and free from the control and rights of the husband as aforesaid scheduled, registered, or recorded in conformity with the laws of the State of Arkansas, in which
18 manner only could his rights be defeated.

That the interest levied on by the marshal and advertised to be sold by him, as charged in the complaint, covered only the life estate of said James M. Hanks and none other, and a purchaser of said property at such sale would only acquire this interest and none of the right, title, or interest of complainant, nor would such purchase cast any cloud on her title; but, on the contrary, her rights would be as fully protected after a sale under this execution as before, and at all events she has as full, complete, and adequate a defense at law as she could desire, and for these reasons defendants deny that said sale would cast any cloud on complainant's title or that she is remediless at law.

And defendants pray to be hence dismissed with their reasonable costs & charges in this behalf sustained, and that the temporary injunction herein granted against defendants be dissolved, &c.

STEPHENSON & TRIEBER,
Solicitors for Defendants.

Filed Feb'y 3, 1887.

SAMUEL I. CLARK, *Clerk.*

19 EXHIBIT A TO BILL OF COMPLAINT.

This deed of bargain and sale, made and entered into this second day of January, A. D. 1871, by & between William Porter and Ann Amelia Porter, his wife, of the county of Phillips and State of Arkansas, parties of the first part and grantors therein, and Helena Hanks, of the same county and State, party of the second part and grantee herein, witnesseth:

That the said parties of the first part, for and in consideration of the sum of five dollars cash to them in hand paid by the said party of the second part at and before the ensealing and delivery of these

presents, the receipt whereof is hereby acknowledged, and for divers other good and valuable considerations, have this day granted, bargained, and sold unto her, the said party of the second part, the following-described lands, lying and being situate in the county of Phillips and State of Arkansas, and more particularly known and described on the plats of the public surveys as part of Spanish confirmation numbered two thousand three hundred & sixty-four (2364), originally patented to Moses Burnett, which said part herein conveyed contains three hundred & fourteen and twenty-seven hundredths acres (314.27), the northwest fractional quarter of
20 section numbered twenty-four (28.16) (24), the northeast quarter of section twenty-three (160) (23), the east half of the northwest quarter of section numbered twenty-three (80) (23), the north half of the southeast quarter of section numbered twenty-three (80) (23), the northeast quarter of the southwest quarter of section numbered twenty-three (40) (23), the northwest fr'ct'l quarter of the southwest fr'ct'l quarter of section numbered twenty-four (48.85) (24), all of township numbered two (2) south of the base line and in range numbered four (4) east of the fifth principal meridian, and containing in the aggregate seven hundred & fifty-six and twenty-eight hundredths (746.28) acres of land, more or less; also lots numbered two (2) and four (4), containing ten (10) acres, and being part of a tract of two hundred and forty acres adjoining the city of Helena, which was assigned to the estate of John F. Hanks in a partition of said tract made in the circuit court of Phillips county, Arkansas, on the chancery side thereof, A. D. 186–; also the following-described lots, situated in the city of Helena, to wit:

Lots numbered sixty-nine (69), seventy-one (71), eighty-one (81), thirty (30) feet off of the north side of lot numbered eighty-nine (89), one hundred and fifty (150), three hundred and seventy-
21 three (373), four hundred and four (404), four hundred & thirty (430), four hundred & seventy-four (474), four hundred & seventy-five (475), four hundred & seventy-six (476), five hundred & twenty-three (523), five hundred & sixty-two (562), five hundred and seventy-one (571), six hundred and two (602), six hundred & sixty-seven (667), six hundred and sixty-eight (668), six hundred & sixty-nine (669), six hundred and fifty-two (652); the said above-described tracts or pieces of lands and lots in the city of Helena, with all and singular the rights, ways, and improvements thereon or thereunto belonging or in anywise appertaining, to have and to hold unto her, the said party of the second part, and to her heirs and assigns forever.

In testimony whereof the said parties of the first part have hereunto set their hands and seals on this the day & year first above written.

WM. PORTER. [SEAL.]
ANN A. PORTER. [SEAL.]

STATE OF ARKANSAS, }
County of Phillips. }

Be it remembered that on this day personally came and appeared before the undersigned, an acting and duly commissioned justice of the peace within and for the county and State aforesaid, William Porter, to me personally well known to be the same person
22 whose genuine signature appears to the above and foregoing deed, and acknowledged that he had sealed, signed, and delivered the same to the within-named grantee of his own free will and accord and solely for the uses, purposes, and considerations therein expressed and set forth.

And at the same time and place also came Ann Amelia Porter, wife of the said William Porter, to me also well known to be the same person whose genuine signature appears to the above and foregoing deed, and, being by me first duly examined in the absence and seperate and apart from her said husband & made acquainted with the nature, contents, and effect of said deed, acknowledged that she had signed, sealed, and delivered the same for the uses, purposes, & considerations therein expressed & set forth; all which they desired I should so certify & which is hereby done accordingly.

Given under my hand as such justice of the peace aforesaid, at my office, on the 5th day of January, A. D. 1871.

[SEAL.] JAS. A. BUTLER,
Notary Public.

STATE OF ARKANSAS, }
County of Phillips. }

I, D. W. Ellison, circuit clerk & *ex officio* recorder for the
23 county aforesaid, do hereby certify that the annexed & foregoing instrument of writing was filed for record in my office at — o'clock on the 24th day of May, A. D. 1875, and the same is now duly recorded in Record Book "A 9," page- 393 & 394.

[SEAL.] In testimony whereof I have hereunto set my hand & affixed my official seal this 26th day of July, A. D. 1875.

D. W. ELLISON, *Clerk.*

EXHIBIT NO. 1 TO ANSWER.

This deed of bargain and sale, made and entered into on this the 2nd day of January, A. D. 1871, by & between James M. Hanks and Helena Hanks, his wife, of the county of Phillips & State of Arkansas, parties of the first part and grantors herein, and Ann Amelia Porter, party of the second part and grantee herein, witnesseth: That the said parties of the first part, for and in consideration of the sum of five dollars cash to them in hand paid by the said party of the second part at & before the ensealing and delivery of these presents and for divers other good and valuable considerations them thereunto moving, have this day granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said party of

the second part all their right, title, or interest, either in their own right or as heirs-at-law of F. Hanks or John F. Hanks, deceased, in and to the following-described tracts, pieces, or parcels of land,
24 lying and being situate in the county of Phillips, State of Arkansas, and more particularly known and described upon the plats of the public surveys as the north fr'ct'l half of the north fr'ct'l half fr'ct'l section number twenty-five (25), the north half of section twenty-six (26), the whole of section number twenty-three (23), the east half of the northeast quarter of section numbered twenty-two (22), the west fr'ct'l half of the southwest fr'ct'l quarter of section twenty-four (24), the northwest fr'ct'l quarter of section twenty-four (24), and part of private survey numbered two thousand three hundred & sixty-four, originally patented to Moses Burnett, & which part herein conveyed contains three hundred & fourteen twenty-seven hundredths (314.27) acres, and making in the aggregate sixteen hundred & thirty-two & eighteen hundredths (1,632.18) acres of land, more or less; also lots numbered one (1), two (2), three (3), and four (4), containing ten (10) acres each, being part of a tract of two hundred & forty acres adjoining the city of Helena, which was assigned to the estate of John F. Hanks in a partition of said tract made in the circuit court of Phillips county, Arkansas, on the chancery side thereof, A. D. 186–; also the following-described lots, situate in the city of Helena, to wit: Lots numbered sixty-nine (69), seventy-nine (79), eighty-one (81), thirty (30) feet off of the north side of
25 lot numbered eighty-nine (89), one hundred & fifty (150), three hundred & fifty-nine (359), three hundred & seventy-three (373), four hundred & four (404), four hundred and five (405), four hundred & thirty (430), four hundred & seventy-four (474), four hundred and seventy-five (475), four hundred & seventy-six (476), four hundred & eighty-two (482), five hundred and twenty-three (523), five hundred and twenty-six (526), five hundred and sixty-two (562), five hundred & sixty-four (564), five hundred and seventy-one (571), five hundred & seventy-two (572), six hundred and two (602), six hundred and fifty-two (652), six hundred and sixty-seven (667), six hundred and sixty-eight (668), six hundred and sixty-nine (669), seven hundred (700), seven hundred and one (701).

The said above-described lots, tracts, pieces, or parcels of land and lots in the said city of Helena, with all and singular the rights, ways, and improvements thereon or thereunto belonging or in anywise appertaining.

To have and to hold the same unto the said party of the second part and to her heirs and assigns forever.

In testimony whereof the said parties of the first part have hereunto set their hands & seals on this the day and year first above written.

JAMES M. HANKS. [SEAL.]
HELENA HANKS. [SEAL.]

26 The above deed was duly acknowledged by the grantors on the 5th day of January, A. D. 1871, before N. Rightoo, justice of the peace.

STATE OF ARKANSAS, }
County of Phillips. }

I, D. W. Ellison, clerk of the circuit court and *ex officio* recorder in and for the county and State aforesaid, do hereby certify that the above and foregoing is a true and correct copy of the original deed or instrument of writing filed in my office for record on the 29th day of January, at 11 o'clock a. m., 1876, and recorded this 20th day of February, A. D. 1876, in Record Book "A 9," pages 767 & 768.

In testimony whereof I have hereunto set my hand and the seal of my office this 25th day of February, A. D. 1876.

[SEAL.] D. W. ELLISON,
Circuit Clerk & ex Officio Recorder.

Agreed Statement of Facts.

In the District Court of the United States for the Eastern District of Arkansas, at Helena.

HELENA HANKS
vs.
ALLEN, WEST & BUSH. } Agreed Facts in Cause.

We hereby agree that this cause be submitted on the following facts for final determination:

27 Defendants recovered a judgment against W. L. Nelson and James M. Hanks in this court, on the law side thereof, for $14,645.29 on October 14th, 1884, with 6 per cent. interest from said date, on a debt contracted in 1881.

That an execution was issued on said judgment on December 14th, 1886, and all the property found by the marshal belonging to either defendant was the interest of James M. Hanks in the lands described in the bill.

These lands were the property of John F. Hanks, a brother of James M. Hanks, who died in 1864, leaving as his sole heirs-at-law his father, Fleetwood Hanks, who by the laws of Arkansas acquired a life interest in said estate, and his brother, James M. Hanks, and a sister, Ann A. Porter, who inherited the estate subject to her father's life estate; that in addition to these lands said John F. died seized of considerable other property & realty.

That the father, Fleetwood Hanks, died in 1870, and thereupon James M. Hanks & Ann A. Porter became the owners in common of said realty.

That in 1871 the said James M. Hanks and Ann A. Porter agreed upon a partition of said estate inherited by them, and the said James M. desired the title to his share of the estate to be vested in his wife, the complainant herein, he being at the time perfectly solvent; that to carry out this object he executed, on January 2nd, 1871, a deed conveying all his interest to all of the lands thus in-

herited to his sister, Ann A., his wife, Helena, joining in the
28 deed to relinquish her dower, a copy of which deed is filed with the answer, marked Exhibit No. 1, and on the same day and at the same time his sister, Ann A., conveyed what was considered one-half in value of the inheritance by deed to complainant, Helena Hanks, including the lands in controversy, her husband, William Porter, joining in her deed for the purpose of relinquishing his marital estate and also to conform to the laws of Arkansas, which at that time required the husband to join his wife in a conveyance of her seperate estate for the purpose of making a valid conveyance thereof, a copy of which deed is filed with the bill of complaint as Exhibit A.

That said lands have since then been cultivated by James M. Hanks as agent of his wife and in her name, for her and not in his own right.

That James M. and Helena Hanks intermarried in the State of Arkansas in 1859, and that thereafter, in 1859, a child was born to them alive, which child was capable of inheriting this estate, and lived until 1862, when it died.

That the deed to complainant from Ann A. Porter & husband was filed for record, as all instruments conveying realty are required by the laws of Arkansas are recorded, in the county where it was situate and where complainant resides and has her home from
29 the date of said conveyance until the present time, on the 24th day of May, 1875, and was duly recorded, but no other schedule of it nor other record nor intention to claim it as her seperate property was ever filed by her.

That the annual rental value of the lands in controversy is $1,200.00, and the life estate of James M. Hanks, if he has any, in said lands is worth $6,000.00.

That the costs of a new advertisement and writ of execution would amount to $25.00.

TAPPAN & HORNOR,
Sol's for Complainant.
STEPHENSON & TRIEBER,
For D'f'd'ts.

Endorsed: Filed March 15th, 1887. Samuel I. Clark, clerk.

Decree.

HELENA HANKS, Complainant,
vs.
J. H. ALLEN, THOMAS H. WEST, & JOHN C. BUSH, Partners Under the Firm Name and Style of Allen, West & Bush, & Thomas Fletcher, as Marshal for the East. District of Arkansas, D'f'd'ts. } 104.

Now, on this day, comes the complainant, by her solicitors, Tappan & Hornor, and the defendants, by their solicitors, Stephenson &

Trieber, and this cause being submitted for final hearing upon
30 the bill and exhibts thereto, the answer and exhibits thereto, and an agreed statement of facts filed herein, and the court having heard the same, it is ordered, adjudged, and decreed that the temporary injunction issued herein restraining the defendants from selling or offering for sale, either by themselves, their agents and attorneys, the following lands, situate, lying, & being in the county of Phillips & State of Arkansas, viz., part of Spanish grant or confirmation 2364, originally patented to Moses Burnett, containing 314.27 acres; the N. W. fr'ct'l ¼ of section 24, containing 28.16 acres; the N. E. ¼ sect. 23, containing 160 acres; the E. ½ of N. W. ¼ of sect. 23, containing 80 acres; the N. ½ of S. E. ¼ of section 23, containing 80 acres; the N. E. ¼ of S. W. ¼ of section 23, & the N. W. fr'ct'l ¼ of S. W. fr'ct'l ¼ of section 24, containing 43.85 acres, all in township two (2) south, in range four (4) east, and containing in the aggregate 746.28 acres, be, and the same is hereby, made perpetual, and said defendants or either of them are forever retrained from selling said lands or any part thereof under any execution issued on said judgment as the property of James M. Hanks, and that said complainant do have and recover of and from said defendants, Allen, West & Bush, all her costs in this behalf expended, for which execution may issue as at law.

Appeal.

From which decree said defendants prayed an appeal to
31 the Supreme Court of the United States, which was granted.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern District of Arkansas:

I, Samuel I. Clark, clerk of the district court of the United States for the district aforesaid, do hereby certify that the foregoing thirty (30) pages of manuscript contain a true, complete, and perfect transcript of the original papers and orders of court in the above-entitled cause as the same now appear on file and of record in my office.

Witness my hand as such clerk and the seal of said court this 23rd day of March, A. D. 1887.

[Seal of the United States Court, Eastern District Arkansas, Helena.]

SAMUEL I. CLARK, *Clerk.*

This transcript, $6.50, p'd by appellants.

Endorsed on cover: E. Arkansas D. C. U. S. No. 316. J. H. Allen, Thomas H. West, and John C. Bush, copartners as Allen, West & Bush, & Thomas Fletcher, as U. S. marshal, appellants, *vs.* Helena Hanks. Filed April 6, 1887.

Supreme Court of the United States.

OCTOBER TERM, 1889.

JAMES H. ALLEN ET ALS., APPELLANTS.

VERSUS

HELENA HANKS, APPELLEE.

BRIEF FOR APPELLANTS,

JACOB TRIEBER.

In the Supreme Court of the United States.

JAMES H. ALLEN, ET ALS., *Appellants.*

VERSUS

HELENA HANKS, *Appellee.*

BRIEF FOR APPELLANTS.

STATEMENT OF FACTS.

This was an action instituted by appellee to enjoin appellants, judgment creditors of James M. Hanks and the Marshal of the United States from selling certain realty, levied on by the Marshal under an execution issued to him out of the U. S. District Court for the eastern district of Arkansas, on a judgment in favor of appellants against appellee's husband and which realty was claimed by appellee as her sole and separate estate and not subject to levy or sale for her huaband's debts. The cause was submitted on an agreed statement of facts, which being very brief, we insert in full here.

AGREED FACTS.

"We hereby agree, that this cause be submitted on the following facts for final determination:

"Defendants recovered a judgement against W. L. Nelson and J. M. Hanks in this court on the law side thereof for $14645.29 on October 14th, 1884 with 6 per cent interest from said date on a debt contracted in 1881.

"That an execution issued on said judgement on the ———day of December 1886 and all the property found

by the marshal belonging to either of the defendants was the interest of J. M. Hanks in the lands described in the bill.

"The lands were the property of John F. Hanks, a brother of James M. Hanks, who died in 1864, leaving as his sole heirs at law his father, Fleetwood Hanks, who by the laws of Arkansas acquired a life interest in said estate and his brother J. M. Hanks, and a sister, Ann A. Porter, who inherited the estate subject to their father's life estate.

"That in addition to these lands said John F. died seized of considerable other realty.

"That the father Fleetwood Hanks died in 1870 and James M. and Ann A. Porter became the owners in common of said realty.

"That in 1871 the said J. M. Hanks and Ann A. Porter agreed upon a partition of the estate inherited by them and the said James M. desired the title to his share of the estate to be vested in his wife, the complainant herein, he being at the time perfectly solvent.

"That to carry out this object he executed on January 2d, 1871 a deed, conveying all his interest to all of the lands thus inherited to his sister Ann A. Porter, his wife Helena joining in the deed, to relinquish her dower, a copy of which deed is filed with the answer marked *Exhibit No. 1*, and on the same day and at the same time his sister Ann A. conveyed what was considered one-half in value of the inheritance, by deed to complainant Helena Hanks including the lands in controversy, her husband Wm. Porter joining in her deed for the purpose of relinquishing his marital estate and also to conform to the laws of Arkansas, which at that time required the husband to join his wife in a conveyance of her separate estate, for the purpose of making a

valid conveyance thereof, a copy of which deed is filed with the bill of complaint as *Exhibit A*.

"That said lands have since then been cultivated by James M. Hanks as agent of his wife and in her name for her, and not in his own right.

"That James M. and Helena Hanks intermarried in the state of Arkansas in 1859 and that in 1859 a child was born to them alive which child was capable of inheriting this estate and which lived until 1862, when it died.

"That the Deed to complainant from Ann A. Porter and husband was filed for record, as all instruments conveying realty are required by the laws of Arkansas to be recorded; in the county where it was situated and where plaintiff resides and has her home and has had from date of said conveyance until the present time, on the 24 th of May, 1875 and was duly recorded, but no other schedule of it, nor other record, nor intention to claim it, as her seperate property was ever filed by her.

"That the annual rental value of the lands in controversy is $2000.00 and the life estate of James M. Hanks, if he has any in said lands is $6000.00."

See agreed facts, page 10 of Record.

Upon these facts the court made the temporary injunction, granted at the commencement of the suit, perpetual, holding that the husband of appellee had no interest in the lands subject to execution and that a sale thereof by the Marshal under the execution would cast a cloud upon appellee's title.

See decree, page 11 of Record.

From this decree appellants appealed.

ASSIGNMENT OF ERRORS.

Appellants assign as errors:

First. That appellee had a full, complete and

adequate remedy at law and for this reason a court of equity had no jurisdiction.

Second. That under the laws of the State of Arkansas the husband of appellee had an interest in these lands during coverture, by reason of the marriage, or a life estate by the curtesy initiate, which was subject to execution.

ARGUMENT

I.

As to the first point, we deem it unnecessary to cite many authorities, as there is no rule of law better settled than the one, that a court of equity will not interfere and grant relief, if there is a full, complete and adequate remedy at law.

New York & Co., vs. Memphis Water Co. 107 U. S. 205.

Holland vs. Challen 110 U. S. 15.

If appellee's husband had no estate by curtesy initiate or by reason of the marriage, in these lands, no title would pass to the purchaser of the lands at the marshal's sale and appellee being in possession, the purchaser at such sale would be compelled to institute an action of ejectment to try the title in order to obtain possession and appellee could defeat his action at law without any more inconvenience, than she was put to in this proceeding, and if successful obtain all the relief she could possibly obtain from a court of equity.

The title she relied on in this action was purely legal and a sale by the marshal under an execution against one, who has no right or title to the premises as is alleged by appellee in her bill of complaint, would cast no cloud on her title, which requires the interposition of a court of equity.

The Supreme Court of Arkansas in Lawrence vs. Zimpleman, 37 Ark. 643 says:

"The rule is, that before a court of equity will interfere to remove a cloud, the title of the adverse claimant must be good on its face and it must be necessary to resort to extrinsic evidence to establish its invalidity."

Under the laws of Arkansas, as construed by this court, a judgement in ejectment is as final and conclusive as in a personal action.

Sturdy vs. Jacoway, 4 Wall. 174.

So there can be no danger of a multiplicity of suits.

Nor is it necessary in the courts of the United States to take this objection by demurrer or in the answer, it is regarded as jurisdictional and may be enforced by the court *sua sponte*, though not raised by the pleadings nor suggested by counsel.

Parker vs. Winnipiscogee Co. 2 Black 545.

For these reasons we submit, that the court erred in not dismissing the bill for want of equity.

II.

As to the second assignment of error, the question to be determined is whether upon the agreed facts, on which this cause was heard below, appellee's husband had under the laws of Arkansas any estate, either by virtue of the marriage or by curtesy initiate, in the lands of his wife?

Sec. 566 Revised Statutes of Arkansas of 1884 is as follows:

"The common law of England, so far as the same is applicable and of a general nature and all statutes of the english parliament in aid of or to supply the defects of the common law made prior to the 4th. year of James 1, (that are applicable to our own form of government) of a general nature and not local to that kingdom and not inconsistent with the constitution and laws of the United States or the constitution and laws

of this state, shall be the rule of decision of this state, unless altered or repealed by the General Assembly of this state."

As the marital estate of the husband in the wife's lands and curtesy initiate existed under the common law, it is a part of the law of this state, unless altered or repealed by a statute or some provision of the constitution of this state.

It is useless for us to trace the history of the various acts of the General Assembly of Arkansas relating to the rights of married women further, than to ascertain, what they were at the time of the marriage between appellee and her husband, at the time of issue, capable of inheriting the estate was born of this marriage, at the time the property in controversy was acquired and at the time this suit was instituted.

In the Revised Statutes of Arkansas of 1858, (Gould's Digest) we find the act in force at the time of appellee's marriage and the birth of the issue. It is chapter 111, page 765. The part applicable to this cause is as follows:

Sec. 1. "Any married woman may become seized and possessed of any property, real and personal, by direct bequest, devise, gift or distribution in her own right and name and as of her own property. Provided the same does not come from the husband after coverture."

Sections 2, 3, 4, 5 and 6 relate only to slave property.

Sec. 7. Before any married woman shall be entitled to the privileges and benefits of the provisions of this chapter, she shall cause to be filed in the recorder's office, in the county, where she lives, a schedule of the property derived through her and no property belonging to any married woman shall be exempt from the

payment of any debts contracted by her husband previous to the filing of the schedule aforesaid."

Sec. 8. "Whenever the deed, bequest, grant, decree or other transfer of property of any kind to any married woman, shall expressly set forth, that the same is designed to be exempt from the liabilities of her husband, such property with the natural increase thereof, shall be deemed and considered as belonging exclusively to such married woman, under the provisions of this chapter and shall not be liable to execution or sale, for the payment of debts of her husband, whether contracted before or after the accruing of the title of the wife,

Provided, That no conveyance from any married man to his wife, either directly or indirectly, shall entitle her to any benefits or privileges of this act."

This statute was in full force at the time of the marriage of appelleee with her husband James M. and also at the time of the birth of their child and at the time this estate was acquired by appellee as we will show hereinafter.

The next act relating to married women was the act of 1861, which is as follows:

"That, whenever any married woman shall become seized and possessed of any property, real or personal under the provisions of chapter 111, pages 765 and 766 of Gould's Digest of the statutes of Arkansas and there is record evidence of such *seizen and possession* in the county, where she resides, it shall not be necessary for her to file a schedule, as provided in section 7 of page 766 of said chapter, to entitle her to the benefit of said chapter."

Pamphlet Acts of Arkansas of 1861, Page 84.

Under this act it must appear from the records, that she is not only seized, but also in possession of

the property and that from the records of the county, where she *resides* regardless of the situs of the property.

As no provision is made by the act, how that evidence is to be placed on the records and as there never was an instance, where any such evidence was shown to have been placed on record, this act has always been treated by the Supreme Court of the state, as wholly nugatory and in none of the decisions of that court on this subject has it ever been taken into consideration or even alluded to, as will be seen by referrence to the several decisions, hereinafter cited and as there is nothing in the records of this cause to show, that any attempt was ever made by appellee to comply with the terms of this act and as in fact, the deed was not recorded at all until after the repeal of this act, we shall disregard it entirely, as has been done by the Supreme Court of Arkansas, as wholly inapplicable.

In 1868, a new constitution was adopted by this state and the following provision, relating to married women, inserted:

"The real and personal property of any female in this state, acquired either before or after marrriage, whether by gift, grant, inheritance, or otherwise, *shall, so long, as she may choose*, be and remain the separate estate and property of such female and may be devised or bequeathed by her, the same, as if she were a *femme sole.*

Laws shall be passed for the registration of the wife's separate property and when so registered and so long, as it is not entrusted to the management or control of the husband otherwise, than as an agent, it shall not be liable for any of his debts, engagements or obligations."

No law was passed by the Legislature in pur-

suance of the above provision, until 1873, but by another provision of the constitution all acts then in force and not in conflict with the new constitution remained in force.

Art. 12, Sec. 6, Const. 1868.

The Supreme Court of Arkansas in several decisions held, that the act found in Gould's Digest remained in full force, until the passage of the act of 1873.

Berlin vs. Cantrell 33 Ark 618.

Tiller & Taylor vs. McCoy 38 I b 95.

Humphries vs. Harrison 30 I b 85.

The act of 1873 passed in pursuance of the constitutional provision above quoted so far, as applicable to this cause is section 4193 of Gantt's Digest of Arkansas statutes of 1874 and is as follows:

"The property, both real and personal, which any married woman now owns or has had conveyed to her by any person in good faith and without prejudice to existing creditors or, which she may have acquired as her separate property, that which comes to her by gift, descent, bequest, grant or conveyance from any person, that which she has acquired by her trade, business, labor or services carried on or performed on her sole or separate account, that which a married woman in this state holds or owns at the time of her marriage and the rents, issues and proceeds of all such property, shall notwithstanding her marriage, be and remain her sole and separate property and may be used, collected and invested by her in her own name and shall not be subject to the interference or control of her husband or liable for his debts, except such debts, as may have been contracted for the support of herself or her children by her as his agent."

Sec. 4201. "Before any married woman shall be entitled to the privileges of this act in respect to prop-

erty held by her separately as aforesaid, she shall cause her said property to be recorded in her name in the county, where she lives or has a residence."

Sec. 4203. "The property of any woman, whether real or personal and whether acquired before or after marriage, in her own right, shall not be sold to pay the debts of the husband contracted or damages incurred by him before marriage."

By the constitution adopted in 1874 and which is now in force the following provisions were enacted:

Art. 9, Sec. 7. "The real and personal property of any femme covert in this state, acquired either before or after the marriage whether by gift, grant, inheritance, devise or otherwise, shall, so long, as she may choose be and remain her separate estate and property and may be devised, bequeathed or conveyed by her the same, as if she were a femme sole and the same shall not be subject to the debts of her husband."

As the act of the General Assembly passed in pursuance of the last clause of the constitution of 1874, only refers to personalty, we deem it unnecessary to refer to it in this brief.

We may also add here, that as to lands owned by a married woman, who was married and had issue born of such marriage, after the adoption of the present constitution, the husband would have no curtesy initiate under the decisions of the Supreme Court of Arkansas.

Neely vs. Lancaster 47 Ark. 175.

But as the marriage, birth of issue and acquisition of the estate (if the latter cuts any figure) all occurred prior to the adoption of that constitution and prior to the enactment of the act of 1873 we submit, that the effect of that constitution or the act of 1873 can cut no figure in this cause.

It will not be denied by counsel for appellee, that

prior to the adoption of the constitution of 1868 curtesy initiate existed in Arkansas and that it was subject to levy and sale for the debts of the husband to the same extent as at common law, nor will it be seriously contended, that it was abolished by the constitution of 1868 or any legislative act prior to 1871, when appellee acquired the land in controversy.

As the issues involved in this cause are confined to the question, what the effect and meaning of the various laws of Arkansas is, it is useless to refer to any other authorities than those of that state, except as to some general principles of law; for the construction of a state law by the hignest tribunal of that state is binding and conclusive on this court, especially in determining the title to realty.

Thatcher vs. Powell 6 Wheat 119.

Miles vs. Caldwell 2 Wall 35.

Townsend vs. Todd 6 U. S 452.

The marital rights of the husband became vested at the time of the marriage and the estate by the curtesy initiate, as soon, as issue capable of inheriting the estate was born of such marriage and no subsequent altercation of the law could take them away.

Cooley on Const. Limitations Page 360.

Mr. Cooley says: "While the interest remains in expectancy merely, that is, until it becomes initiate, the Legislature may modify or abolish it, but the moment a child was born of the marriage, who might by possibility become heir to such estates, the husband's rights become vested and is property, subject to conveyance and to be taken for debts, no more subject to legislative interference, than other expectant interests, which have ceased to be mere contingences and become fixed."

In Tiller and Taylor vs. McCoy 38 Ark 91 the facts

were, that Mrs. McCoy was the owner of an estate at the time of her marriage, which took place in 1872, and live issue was not born of this marriage until May, 1875. The debt, for which her land had been levied on, was only contracted in 1875, still the court held, that the husband had an estate in the lands which was acquired by him at the time of the marriage and that the constitution of 1874 could not divest him of it. As this is the leading case on this subject in this state we must be pardoned for referring to it so fully.

The court after referring to the constitution of 1868 says:

"No scheduling act was passed under this section of the constitution until the act of April 28, 1873. Chapter 111 of Gould's Digest, title Married Women (except so much, as relates to slaves) was in force. By sec. 7, chapter 111 Gould's Digest a married woman was required to schedule her property in the recorder's office of the county, where she resided in order to protect it from her husband's debts. Appellee did not schedule her land, as required by the act in Gould's Digest and she held it by inheritance and not by any conveyance or bequest &c., showing, that it was to be exempt from liabilities of her husband, nor did she cause the land to be recorded in her name, as required by the act of April 28th., 1873."

The decree of the lower court enjoining the sheriff from selling the land, under an execution against her husband, was therefore reversed and the bill ordered to be dismissed.

In Shryock vs. Cannon 39 Ark. 434 the facts were:

In 1867 appellee acquired the land, her deed was acknowledged and recorded. In 1878 she and her husband executed a deed of trust to secure a debt due appellant, but the acknowledgement of the wife was

so defective, that under the laws of Arkansas her deed passed nothing of her interest. The Trustee threatening to sell the land under the powers of the Trust deed, she sought to enjoin him and the court held, that, as she had never scheduled the land, as provided by statute, then in force (Gould's Digest sec. 7, chapter 111) or any subseqent statute (Gantt's Digest section 4201) and her husband living at the time of the adoption of the constitution of 1874 he had such an interest in the land, which was not and could not be thereby divested, referring to Tiller vs. McCoy supra, and that his conveyance being good, it passed his life estate to the Trustee. In this case the deed to her was duly recorded, as the deed of appellee's was, but this was not deemed by the court sufficient under any of the acts of the state.

In Freed vs. Jones 42 Ark. 357 the same question came again before the court. In that case the facts were:

That Mrs. Ferrell, then unmarried, acquired the lands in 1862 and was married to Dacus in 1865, but the land was not scheduled. In 1866 Dacus conveyed the land as his own, his wife only joining, for the purpose of relinquishing dower. In an action of Mrs. Dacus against tne parties in possession under the deed of 1866, the court held:

"The relinquishment of dower by Mrs. Dacus did not carry the fee, yet it was effectual to pass the interest acquired by the husband by marriage which was, to take the rents and profits during coverture and his right to curtesy, if there has been issue born alive of this marriage.

In Chrisman vs. Partee and wife 38 Ark 31 the question of the husband's interest in the wife's land, acquired by her, while the constitution of 1868 was in

force (the time, during which appellee's land was acquired by her) came before the court and as in all other cases decided by that court the marital estate of the husband to the wife's land was held to exist. The late Chief Justice in delivering the opinion of the court says:

"Mrs. Partee did not hold the lands under any deed or will settling them upon her to her sole or separate use, but she held them by inheritance from her father &c.

It does not appear that she ever scheduled the land. It may be taken to be true upon the record before us, that at the time Partee contracted to convey the land (which was in December 1876) *the fee was in his wife and he had the right to the use of them during coveture, which was a freehold estate, with expectancy of curtesy."*

See 38 Ark. page 58.

Also Erwin vs. Puryear 50 Ark. 356 decided Mar. 1888.

The facts in this case, as shown by the agreed statement, on which the cause was heard, are almost identical with those, upon which the cases above cited, were decided.

The marriage between appellee and her husband, the execution debtor, took place in 1859, when he acquired at once a right to the rents and profits of all lands owned by his wife, during coverture unless the deed or devise, under which she held the lands expressly excluded his marital rights, or if scheduled in conformity with the laws then in force, and as to the latter, not even then, if acquired either directly or indirectly from the husband, as the statute makes special provision, that no conveyance from any married man to his wife, either directly or indirectly, shall entitle her to the

benefits of the act. Sec. 8. Chap. 111, Gould's Digest supra.

As shown by the agreed statement of facts, these lands were originally her husband's and indirectly conveyed to her by him.

See Record page 10

That he was then solvent, does not affect his marital rights, which are the only ones sought to be subjected to the payment of appellant's judgment, although it might be a good defense, were this an action, to set the entire conveyance aside as fraudulent and subject the fee to sale under the writ of execution.

When in 1859 issue, capable of inheriting this estate was born of this marriage, he at once acquired an estate by the curtesy initiate or an estate for life, which he could convey without his wife's consent, and which was subject to execution for his debts.

Mattocks vs. Stearns 9 Vt. 326.

Roberts vs. Whiting 16 Mass. 186.

Tillar vs McCoy 38 Ark. 91.

Erwin vs. Puryear 50 1b 356.

Nor is it necessary, that the essentials of curtesy coincide in time. Lands acquired after the death of the issue, are as much subject to the husband's curtesy, as those owned by her at the time of the birth.

Guion vs. Anderson 8 Humphr. 298.
Phillipps vs. Ditto 2 Duv. 549.
Jackson vs. Johnson 5 Cow 74.
Heath vs. White 5 Conn. 235
I Washburn on Real Prop. Page 178, 4th Ed.

The land was acquired by appellee on January 2d, 1871, when the law, found in Chap. 111 of Gould's Digest was in full force, as held by the Supreme Court of

Arkansas in the cases hereinbefore cited. But it is contended that the recording of the deed on May 24th, 1875 was a compliance with Sec. 4201 of Gantt's Digest, the act of 1873, but this is clearly erroneous, for by the provisions of the constitution of 1874 this section was repealed by implication, as no further necessity existed for it, and in the last revision of the statutes of the state (Mansfield's Digest, published in 1884) this section is entirely ommitted.

The general rule of law is: "That when a later act covers the whole subject of the earlier, embraces new provisions, which plainly show that the last was intended as a substitute for the first, it will operate as a repeal."

Murdock vs. City of Memphis 20 Wall 590.

King vs. Cornell 106 U. S. 395.

The constitution of 1874 emancipates married women entirely, so that she can convey and dispose of her property, the same as if a *femme sole* and this being so, the marital rights of the husband in his wife's lands, as well as curtesy initiate are entirely abolished, except as to rights, vested before the adoption of the last constitution.

Roberts vs. Wilcoxson & Rose 36 Ark. 355.

Neely vs. Lancaster 47 Ib 355.

But conceding, that this section is still in force, was the mere recording of the deed, as all deeds of conveyance are by the recording acts of Arkansas required to be recorded, for the purpose of notice and in order to permit their introduction as evidence without proof of execution a compliance with that act?

In order to construe this section correctly the intent of the Legislature. as expressed, not only in the act itself, but the constitutional provision in pursuance of which it was enacted and the construction placed upon

the act by the highest tribunal of the state, from which this constitutional provision is a copy must be ascertained and if once ascertained the act must be construed in conformity therewith.

By the terms of Art. 12, section 6 of the constitution of 1868, which is hereinbefore fully set out, the property of a married woman, was to remain her separate estate, "*so long, as she may choose*" with power to devise or bequeath the same, as if she were a femme sole, but she was not vested with the power to sell, as she is by the constitution of 1874. Now how was she to choose?

This was answered by the same section: "By registering it as her separate property and for that purpose the Legislature was directed to pass laws for the *registration* of the wife's separate property and when so *registered* &c., shall not be liable for the husband's debts or obligations.

When in 1873 the Legislature in pursuance of this constitutional direction enacted a law, they used the word "recorded" section 4201 Gantt's Digest supra, but, taken in connection with the constitutional provision, the meaning of the word was clearly intended to be "registered or scheduled."

That something else was required, than the mere recording of the deed, as required by the general recording acts of the state, is evident from the fact, that in the latter case, the deed must be recorded in the county, where the land is situated. Section 671 of Mansfield's Digest, act of 1846, is as follows:

"No deed, bond or instrument for the conveyance of any real estate or by which the title thereto may be effected in law or equity, hereafter made or executed

shall be good or valid against a subsequent purchaser of such real estate for a valuable consideration &c., unless such deed. bond or instrument, duly executed and acknowledged or proved as required by law, shall be filed for record in the office of the clerk and ex-officio recorder of the county, *where such real estate may be situated.*"

Under the married women's act, she was required to cause her said property to be recorded in the county, *where she lives or resides*, regardless of the situs of the land.

That appellee happened to reside in the same county, where this estate is situated did not relieve her of a separate registration, giving notice to the world, that she chooses to hold her property as her separate estate.

By the Act of December 15th., 1875, section 4640 of Mansfield's Digest of Arkansas statutes, a form is given for the registration of personality in conformity with the provisions of the constitution of 1874, which directs the General Assembly to enact laws for the registration of personal property of married women, the same as the constitution of 1868 required it for real, as well as personal property. This section is as follows: "The schedule of a married woman's separate property may be in the following form:

STATE OF ARKANSAS, }
COUNTY OF PULASKI, } ss.

Be it known that I, Mary Fowler, wife of John Fowler of the county and state aforesaid, own in my own right the property below described, which I hereby schedule as my separate property to-wit: One bay horse &c....

Witness my hand this day of A. D. 1...

"MARY FOWLER."

This indicates to the world, that Mary Fowler chooses to hold her property as her separate estate.

The provision of the constitution of 1868 as to the registration, is in effect but a copy of the Act published in Gould's Digest and in force at the time, that constitution was framed; and it is a well settled rule, that when a statute is re-enacted, the construction of that statute, pror to its re-enactment, becomes a part of the statute.

Scruggs vs. Blair 44 Miss 406

Durrame vs. Harrison 26 Ala 326

Galbraith vs. Galbraith 5 Kas 402

G. C. & S. R. R. Co. vs Ft. W. & N. O. R. Co 68 Tex. 98.

In 1868 this section of Gould's Digest was construed by the Supreme Court in Howell vs. Howell 19 Ark 339, where the court says:

"It is plain, that the true intent of the Legislature, in reference to the schedule, was not only, that it should perform the office of notice to creditors and purchasers, but also the not less important one of evincing, on the part of the married woman her election to avail herself of the benefits of the law."

"These benefits, for the enjoyment of which the law had also created for her ample legal capacity, were nevertheless, but at *the option* of the married woman. Perhaps having quietly surrendered to her husband at discretion, by force of the canons at church, she might for a time desire no emancipation from his dominion, as that had been regulated by the common law, but afterwards prudential motives in reference to her offspring might suggest the propriety of securing for herself the property, she had brought into the marriage or which had afterwards come in from her own kindred.

This it was the manifest intention of our law, with due regard to the rights of the creditors of the husband, to permit her to do, at any time during coverture, so far, as the same had not been disposed of by the husband or *encumbered with his debts.* The instrument, by which this is to be effected, so far, as she is to be the actor, is the schedule."

The same question came again before the Supreme Court in 1878 in a case, in which the husband had mortgaged his wife's property in 1875 and the evidence showed, that the wife had scheduled the property as her separate estate, before marriage and while a femme sole and the court held, that the schedule filed by her, while a femme sole was a nullity and not having scheduled it after marriage, the husband had a right to dispose of it, quoting with approval the language used in Howell vs. Howell supra.

Berlin vs. Cantrell, 33 Ark. 619.

On behalf of appellee it was contended in the court below and no doubt it will again be insisted on in this court, that as appellants had notice from the records, that this property belonged to appellee at the time the debt was contracted, they cannot now complain.

If we now attempted to subject the fee to these lands, to the payment of our judgement, this objection might be fatal to our claims, but as stated by Justice Scott in Howell vs. Howell and by Chief Justice English in Berlin vs. Cantrell: "The intent of the Legislature in reference to the schedule was not only, that it should perform the office of notice, but also the not less important one of evincing on the part of the married woman her election to avail herself of the benefits of the law" or in the language of the constitution of 1868:

"That she chooses to hold her property as her separate estate."

Before the enactment of these statutes, the marital rights of the husband in the wife's real estate could only be excluded by the acts of the grantor or testator, from whom she acquired the estate expressed in the instrument, under which she derived her title. No proof, as to the grantor's or testator's intent, except it appeared from the face of the instrument itself, was admissible.

By force of these statutes, the wife was enabled to do that, which formerly her ~~own~~ grantor only could do, but to enjoy this benefit, depended, on her strictly complying with the terms of the statutes and from the authorities cited by us, it is clear that in Arkansas no other proof, than the schedule, by which she evinces her intention to keep her property, as her separate estate is admissible or competent to prove that fact.

These statutes being in derogation of the Common Law must be strictly construed.

Hitz vs. Metropolitan National Bank 111 U. S. 722 can have no application to this cause.

This court was there called upon to construe an act of Congress and was not bound by the decisions of any local courts, while in this case, the only question before the court is, what is the law of the state of Arkansas, as heretofore construed by the highest tribunal of that state in regard to the title of real estate lying and situated in that state?

Besides the statutes in the two cases are different and can be easily distinguished.

Section 727 of the Revised Statutes of the District of Columbia exempted the wife's lands absolutely from

the control of the husband and from liability for his debts.

This court say: By this act three distinct departures from the old law are announced:

First: That her rights shall be as absolute, as if he were unmarried.

Second: That it shall not be subject to the disposal of her husband.

Third: That it shall not be liable for his debts.

As to the first, the court say, that his vested rights could not be effected by the act and as to the third the court hold, that the exemption from liability for his debts divests him of no right and does him no injury.

By that act the wife was not required to do anything to obtain its benefits, the act itself invested her with this privilege and in effect abolished curtesy and every other interest, which the Common Law gave to the husband in the wife's property.

Neither of the acts of Arkansas went thus far.

By the act of 1851, section 7 of Chapter 111 of Gould's Digest, the scheduling was made a condition precedent to her obtaining its benefits and then only for debts contracted by the husband after the filling of the schedule. A similar provision we find in the constitution of 1868 and the act of 1873. And even in the constitution of 1874 this privilege was only granted to her, as long, as she may choose.

For these reasons we submit. that the decision in Hitz vs. Metr. Nat. Bank has no application in this case.

While we maintain, that Mr. James M. Hanks has a life estate in the lands by the curtesy initiate, it is really immaterial, for if he has only an estate during coverture, the decree of the lower court perpetually

enjoining us, is erroneous, conceeding, that a court of equity had jurisdiction.

After a sale under an execution in an action at law for the possession, the question whether his estate is one for life or during covertvre only, can be fully determined.

We therefore submit, that the decree of the lower court was erroneous and should be reversed with directions to dismiss the Bill.

Respectfully,

JACOB TRIEBER,

For Appellants.

Office Supreme Court U. S.
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IN THE SUPREME COURT OF THE UNITED STATES.

JAMES H. ALLEN ET AL., *Appellants,*

v. } No. 316.

HELENA HANKS, *Appellee.*

JAMES C. TAPPAN,
JOHN J. HORNOR,
Attorneys for Appellee.

WOOD PRINTING CO., LITTLE ROCK, ARK.

IN THE SUPREME COURT OF THE UNITED STATES.

JAMES H. ALLEN ET AL., *Appellants*,

v. No. 316.

HELENA HANKS, *Appellee*.

This is a suit brought by the appellee against the appellants to enjoin the sale of certain lands, described in the bill of complaint, which had been levied upon under an execution in favor of appellants and against James M. Hanks, husband of appellee, to satisfy a judgment recovered by appellants against said James M. Hanks. The lands were claimed by appellee as her own property, under a deed from William and Ann A. Porter, dated January 2, 1871, duly acknowledged, filed and recorded.

The contention of appellants was that, inasmuch as James M. Hanks was the husband of Helena Hanks, appellee, and they had had issue born alive, capable of inheriting, said James M. Hanks was vested with an estate by the curtesy, which was subject to seizure and sale under such execution.

The errors assigned, were :

1. That a court of equity had no jurisdiction, because the appellee had a full, complete and adequate remedy at law.

2. That under the laws of the State of Arkansas the husband was seized of an estate by the curtesy initiate, which was subject to execution.

ARGUMENT.

I.

A CHANCERY COURT HAS THE POWER TO INTERVENE TO PREVENT THE SALE OF REAL ESTATE UNDER LEGAL PROCESS UPON THE ALLEGATION THAT SUCH PROCEEDING WOULD CULMINATE IN CASTING A CLOUD UPON COMPLAINANT'S TITLE.

High on Injunctions, Sec. 269.

Irwin v. Lewis, 50 Miss., 363.

Petit v. Shepherd, 5 Paige (N. Y.), 493.

Christie v. Hale, 46 Ill., 117.

Hinckley v. Haines, 69 Me., 76.

Oakley v. Williamsburgh, 6 Paige (N. Y.), 262.

It is no objection to the jurisdiction of the Chancery Court that the sale would confer no title upon the purchaser.

High on Injunctions, Sec. 269.

Bank of the United States v. Schultz, 2 Ohio, 471.

Norton v. Beaver, 5 Ohio, 178.

Key City Co. v. Munsell, 19 Iowa, 305.

Pixley v. Huggins, 15 Cal., 127.

Bennett v. McFadden, 61 Ill., 334.

Vogler v. Montgomery, 54 Mo., 577.

Uhl v. May, 5 Neb., 157.

The rule of law in Arkansas, as in other States, has been stated to be that a court of equity will not interfere to remove a cloud when the title of the adverse claimant is *void on its face.*

Lawrence v. Zimpleman, 37 Ark., 643.

Chaplin v. Holmes, 27 Ark., 414.

Allen v. City of Buffalo, 39 N. Y., 390.

Marsh v. City of Brooklyn, 59 N. Y., 282.

To deprive the Court of Chancery of jurisdiction in this cause, it would be necessary to indulge the presumption that some irregularity existed in the proceedings or would occur in the sale, which irregularity would be manifest upon the *face of the deed* and render it void. On this point the law is too well settled to admit of further argument.

II.

APPELLEE CONTENDS THAT HER HUSBAND, J M. HANKS, THE EXECUTION DEBTOR, HAD NO ESTATE IN THE LANDS LEVIED UPON SUBJECT TO SEIZURE AND SALE.

Appellee acquired title to the lands levied upon under a deed dated January 2, 1871 (Pr. R., pp. 6 and 7), which deed was not filed for record until May 24, 1875. (Pr. R., p. 8.)

The appellee was married and had issue born alive, capable of inheriting, in the vear 1859; the child died in 1862.

The law in force then upon the subject of married women provided for a separate estate, but before she was entitled to the privilege, the deed, bequest, grant, decree or other transfer of the property, was required to set forth that the same was designed to be exempt from the liabilities of her husband.

Gould's Dig., Chap. 111, page 765.

Subsequently, in 1861, another act was passed relating to married women in which it was provided that no schedule was required to be filed by her to entitle her to the benefit of the above provisions, provided the deed to the property was recorded in the county in which she resided.

Pamphlet Acts of 1861, page 84.

Before appellee acquired the title to this property, and before the deed was executed which conveyed it to her, another Constitution was adopted by the State of Arkansas in 1868, which contained the following provision relating to married women:

"The real and personal property of any female in this "State, acquired either before or after marriage, whether by "gift, grant, inheritance or otherwise, shall, so long as she may "choose, be and remain the separate estate and property of "such female, and may be devised and bequeathed by her, "the same as if she were *femme sole*. Laws shall be passed "for the registration of the wife's separate property, and when "so registered, and so long as it is not entrusted to the man-"agement or control of the husband, otherwise than as agent, "it shall not be liable for any of his debts, engagements or "obligations."

Art. XII, Sec. 6, Cons. 1868.

This property was acquired by the appellee under the provision of this Constitution.

In accordance with this provision of the Constitution the married woman's act of 1873 was passed, which is to be found in

Gantt's Dig., Sec. 4193,

by which all of her property, real and personal, was exempt from all liability for the debts of the husband, but it was expressly provided that, before she was entitled to the benefits of the act, she should cause her separate property to be recorded in her name in the county where she lived or had her residence.

Gantt's Dig., Sec. 4201.

In accordance with the provisions of this act, the deed under which appellee held the property was filed for record, and recorded in Phillips County, where appellee resided.

Subsequently, in 1874, another Constitution was adopted, which gave the power to a married woman to dispose of her real estate, whether acquired before or after marriage, by gift, grant or devise, the same as if she were a *femme sole.*

Art. IX, Sec. 7.

Although this property was acquired as between the grantor and the grantee when the deed was executed and delivered in 1871, yet, as to the public, it was not acquired until after the adoption of the Constitution in 1874, because not recorded until after that time.

The principal contention between appellant and appellee is as to when the right of the husband to the property of the

wife *vests*. The appellant contends that marriage and birth of issue immediately vests in the husband an estate by the curtesy, whether the wife owns property or not, and that no legislation is constitutional which deprives the husband of this vested estate which will attach to any property acquired by the wife after such legislation. On the other hand, appellee contends that she owned no property at the time of marriage and birth of issue, and that before she acquired any property the married woman's law was changed by the Constitution of 1868, so as to vest in her an absolute title to all property acquired by her exempt from any estate in the husband subject to seizure by his creditors, and that the only limitation upon such right was that she should comply with such acts of the Legislature as might be passed in regard thereto, and that when the act of April, 1873, was passed, and she recorded her deed under the provisions of that act, her title to the real estate acquired under the Constitution of 1868 was free and exempt from any liability to the debts and contracts of her husband.

The only limitation upon the power of the Legislature is that contained in the Constitution of the United States prohibiting the passage of any laws by the States impairing the obligation of contracts.

Under this provision of the Constitution no State can deprive anyone of a vested right. Can it be said, however, that a husband upon marriage and birth of issue alive, has a vested right in property not in existence?

A mere expectation is not a vested right.

Cooley on Con. Lim., p. 359.

It is not contended by appellee that under such circum-

stances a husband would not acquire a vested right in the property then possessed by the wife, or which she might acquire before the change of the law.

"At the common law the husband immediately on the "marriage succeeded to certain rights in the real and personal "estate which the wife then possessed. These rights became "vested rights at once, and any subsequent alteration of the "law could not take them away. But other interests were "merely in expectancy."

Cooley on Cons. Lim., p. 361 (3d Ed.)

When such rights of property become subject to conveyance, and to be taken for debts, they must be regarded as vested rights, and thereafter not subject to legislative interference.

Id.

Until then the Legislature has full right to modify or even to abolish.

The Legislature possesses full power to change the rights of the husband in the property acquired by the wife after the passage of the act.

Moore v. Mayor of New York, 8 N. Y., 110.

Westervelt v. Gregg, 12 N. Y., 208.

Norris v. Beyea, 13 N. Y., 273.

Clark v. McCreary, 12 S. & M., 347.

To the same effect have been all decisions in Arkansas.

Tillar & Taylor v. McCoy, 38 Ark., 91.

In *Tillar & Taylor v. McCoy*, the property was held liable for debts of the husband upon the ground that the statutes of the State of Arkansas providing for the separate estate of a married woman, and its exemption from the debts of her husband had never been complied with. The marriage took place under the Constitution of 1868, but the married woman failed to schedule her separate estate, as provided for in Gould's Digest, *supra*, and after the passage of the act of April 28, 1873, failed to cause the land to be recorded in her name as required in said act. It expressly said that the Constitution of 1874 was not applicable, because adopted after the husband had acquired a vested estate in the wife's land; there had been marriage, birth of issue alive, and seizin of the land before the adoption of the Constitution of 1874.

To the same effect is

Chrisman v. Partee, 38 Ark., 31.

In this case, as in *Tillar and Taylor v. McCoy*, the property was acquired by the married woman by inheritance from her father, no record or schedule of the property was made as provided for by the Constitution of 1868, or the act of the Legislature of 1873. Consequently, although inherited after the passage of the Constitution of 1868, nothing was done to change the marital rights as fixed by the common law.

The Supreme Court of Arkansas, in *Shryock v. Cannon, 39 Ark., 434*, decided that the Constitution of 1874 did not, and could not, divest the vested marital rights of the husband acquired in the lands of the wife before its adoption.

Subsequently, in the case of *Criscoe v. Hambrick, 47 Ark.*,

235, the court uses the following language in explanation of its decision in *Shryock v. Cannon*:

"The court below may have been mislead, as Mrs. Hays' "counsel certainly has been mislead by the case of *Shryock v.* "*Cannon*, *39 Ark.*, *434*. But there, although the conveyance "by the married woman was made in 1878, yet the land had "been acquired by her in 1867, after her marriage, and her "husband had a vested interest which could not be divested "by legislation."

"But in the present case the inhertance came to Mrs "Hays, in 1873, and was her separate estate."

Prior to the Constitution of 1868, and the married woman's act in Gould's Digest, *supra*, tenancy by the curtesy in Arkansas was fixed by the common law, and four things were requisite to the estate, viz.: *Marriage*, *actual seizin* of the wife, *issue* and *death* of the wife.

McDaniel v. Grace, *15 Ark.*, *465*.

There can be no estate by the curtesy until there is seizin of property. Prior to that time, although there may be marriage and birth of issue, it is a mere expectancy in the husband and not a vested right.

A husband does not necessarily take a vested right in all the real estate which may come to the wife. An estate may be devised or settled on the wife, and so limited as to give the wife the inheritance and deprive the husband of curtesy.

1 Washburn on Real Property, *155* (*3d Ed.*)

The husband's curtesy is in many respects but a continuation of the estate of the wife; it devolves upon him as the estate

of the ancestor does upon the heir. The husband takes the estate subject to the same encumbrances under which the wife held it.

Id., 166 and 167.

If an estate may be limited to the wife so as to deprive the husband of curtesy, if the husband's estate is a continuation of the wife's inheritance, and he takes it in the same manner that the estate of the ancestor devolves upon the heir, he certainly takes the estate subject to the provisions and limitations imposed upon the property by the statute under which the wife acquired the title. Such statutes violate no vested rights of his, because, as we have seen there can be no vested right of curtesy until there is seizin of property by the wife.

Hathon, Gd'n, v. Lyon, 2 Mich., 94.

Thurber v. Townsend, 22 N. Y., 517.

Criscoe v. Hambrick, supra.

In the last named case the Supreme Court of Arkansas held that a husband had a vested interest in the property of the wife acquired by her before the adoption of the Constitution of 1868, which could not be divested by legislation, but that he had no vested right in the property acquired by the wife under the Constitution of 1868, and consequently there was no estate in the husband as to such property subject to levy and sale under execution.

In the case at bar, when appellee recorded her deed under the act of April 28, 1873, everything was done upon her part to perfect the separate estate in her. From the date of the execution of the deed, January 2, 1871, which conveyed the prop-

erty to her, she held that property with the right to protect it from the creditors of her husband, by filing a schedule as specified in the Constitution, or by complying with any future act of the Legislature on the subject, and inasmuch as the rights of appellants did not accrue before she recorded the deed, she lost nothing by the postponement of such recording.

This is not a contest between the *husband* and the *heirs of the wife* to enforce his marital rights, but is an effort upon the part of *judgment creditors* of the husband to deprive the wife of the possession of her property and take from her the rents and income of her separate estate and appropriate it to the payment of their debts. It is not denied that this property was acquired under the Constitution of 1868; that this Constitution gave to the wife a separate estate and provided for its exemption from the debts of the husband; and it is further not denied that the Constitution of 1874 still further enlarged the rights of married women in their separate property, and forever prevented the sale of them for the debts, contracts or liabilities of the husband, without the necessity of any action on the part of the wife, and it is further apparent that the debt upon which the judgment was entered and now sought to be enforced was contracted after the adoption of the Constitution of 1874 and while its provisions were in full force; yet it is claimed that, inasmuch as the husband, in 1859, long before the wife acquired the property, by the birth alive of a son, became vested with an estate in all the property and earnings which might during the life of the wife be acquired by or come to her; that this estate of curtesy bound the wife with chains, forever made her subservient, and that no Legislature, and no assemblage of the people in Constitutional

Convention would ever thereafter possess the power to free her, or enable her to enjoy the fruits of her earnings. The disenthrallment of the wife violates no rights of appellants; their debt was not in existence when the Constitutional Convention of 1868 saw fit to provide that she might acquire separate property, nor was it even in existence when the Constitutional Convention of 1874, with more advanced ideas upon the subject of rights of married women, still further enlarged her powers over her separate estate. No obligation of a contract was violated as to them.

The case at bar is simply an effort of the creditor, whose debt accrued after the adoption of the Constitution by the convention of the people assembled, to say that this Constitutional Convention had no power to declare that the property of the married woman should not be exempt from the debts of her husband.

Our contention is that the Legislature or the Convention possessed the power to declare that neither the property of the wife or the property of a married man should be taken on execution at the suit of any creditor for a debt contracted after the adoption of said Constitution.

The Congress of the United States passed a married woman's act for the District of Columbia, by which it was provided that the property of a married woman should not be liable for the debts of a husband. *Rev. Stats. Dist. Col., Sec. 727.*

Under that statute it was held by this court that a married man had no estate in his wife's property, subject to sale under execution for his debts, although he was married and had

issue born alive before the passage of the act; that Congress possessed the power and intended by the act to withdraw from liability for the debts of the husband the property of the married woman, and as to creditors whose debts were contracted thereafter, no injustice was done. The court say:

"It would be a queer construction of the statute, looking "at its manifest purpose, to hold that it means, though her "property shall never come under his control and he shall ac- "quire no interest in it, and it shall never be liable for his "debts, the use and possession, the rents and profits of it, may "be made liable for his debts as long as he lives."

Hitz v. Nat'l Met. Bank, 111 U. S., 722.

This case has been quoted with favor by the Supreme Court of Arkansas. See *Neely v. Lancaster, 47 Ark., 175.*

In Arkansas this question has never come directly before the Supreme Court. In all the cases passed upon, the property was either acquired before the adoption of the Constitution of 1868, or it was acquired by inheritance after the adoption of the Constitution of 1868 and before the adoption of the Constitution of 1874, no schedule filed and no deed recorded as provided for in the Constitution of 1868, and the act of 1873, so as to make it the separate property of the wife, exempt from the liabilities of the husband.

In the case at bar, as shown by the agreed statement of facts, the property was acquired by deed, the deed was recorded in the county in which appellee resided, it was in the actual possession of the wife, in no way entrusted to the husband except as her agent, and she was taking the rents and profits therefrom.

Could a separate estate be more distinctly manifested?

Further argument would seem to be entirely unnecessary.

This cause was decided in the court below by the distinguished District Judge, whose familiarity with the Statute Laws of Arkansas is not exceeded by any man in the State, who was the digester of the laws in 1873, as compiled in Gantt's Digest, and who granted the injunction in this cause, restraining the sale, without even requiring a bond from the appellee. (*Pr. R., p. 3.*)

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